UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 12-CA-165320

20/20 COMMUNICATIONS, INC.,

Respondent,

and

CHARLES SMITH, an Individual,

Charging Party.

RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent 20/20 Communications, Inc. ("20/20," the "Company," or "Respondent") pursuant to Rule 102.46 of the National Labor Relations Board's ("NLRB" or "Board") rules, files the following Exceptions to the decision of Administrative Law Judge ("ALJ") Michael A. Rosas, dated September 6, 2016.[1]

1. Respondent excepts to the ALJ's failure to defer to the federal district courts' finding that Respondent's Mutual Arbitration Agreement (the "MAA") is enforceable under the National Labor Relations Act ("Act" or "NLRA"). The ALJ and the Board are collaterally estopped from re-deciding issues decided by the district courts, including that the MAA is

[1] The Administrative Law Judge's decision is cited as "ALJD" followed by the appropriate page and line numbers.

subject to the Federal Arbitration Act ("FAA"), lawful, and enforceable. (ALJD p. 6, line 28 – p. 7, line 5 and *passim*.)

2. Respondent excepts to the ALJ's failure to defer to the federal district courts' findings that the Board's decision and reasoning in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), conflicts with the Federal Arbitration Act and the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). (ALJD p. 5, line 36 – p. 6, line 43 and *passim*.)

3. Respondent excepts to the ALJ's application of the Board's decisions in *D.R. Horton* and *Murphy Oil USA, Inc.* 361 NLRB No. 72 (2014), enf. denied in relevant part, --- F.3d ----, 2015 WL 6457613 (5th Cir. Oct. 26, 2015), which were both wrongly decided. (ALJD p. 5, line 36 – p. 6, line 43 and *passim*.) The Board's decisions in *Murphy Oil* and *D.R. Horton* are beyond the Board's authority, inconsistent with the Act, contrary to the Federal Arbitration Act, contrary to precedent of the U.S. Supreme Court, the U.S. Courts of Appeals, and other federal and state courts, and otherwise unlawful, and those decisions should be overruled.

4. Respondent excepts to the ALJ's finding that Respondent's voluntary MAA abridges employees' Section 7 rights. (ALJD p. 6, line 44 - p. 7, line 38; *passim*.)

5. Respondent excepts to the ALJ's finding that a class action waiver restrains employees from filing unfair labor practices with the Board. (ALJD p. 7, lines 40 - p. 8, line 7.) The ALJ's finding is confined to a section heading, lacks any relevant analysis, and appears to be a typographical error. Moreover, the Fifth Circuit recently made clear that it would ***not*** be reasonable for employees to read an arbitration agreement as prohibiting them from filing charges with the Board where the agreement, as it is the case here, states explicitly that it does not do so. *Murphy Oil*, 2015 WL 6457613, at *5 (5th Cir. Oct. 26, 2015).

6. Respondent excepts to the ALJ's finding that Respondent's Motion to Compel Arbitration violates the Act. (ALJD p. 8, lines 9 - p. 8, line 25.)

7. Respondent excepts to the ALJ's finding that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing its Mutual Arbitration Agreement (*i.e.*, the MAA) by requiring employees to resolve employment-related disputes exclusively through individual arbitration, and forgo any right they have to resolve such disputes through class or collective action. (ALJD p. 8, lines 32-38.) This finding is clearly erroneous. The agreement clearly does not require employees to resolve employment-related disputes exclusively through individual arbitration or to forgo a purported right to resolve such disputes through class or collective action. The employees may opt out of the arbitration agreement and the MAA expressly advises employees that its arbitration provision only covers "any claim or dispute that a ***court (judge or jury)*** would otherwise decide."

8. Respondent excepts to the ALJ's finding that Respondent's MMA prevented Charging Party from engaging in protected concerted activity within the meaning of Section 7 of the Act in pursuing his legal claims where the ALJ found that Charging Party and at least seventeen (17) other individuals filed eighteen (18) separate arbitration cases against Respondent represented by the same attorney and pursuing the same claims. Indeed, the undisputed evidence shows that Charging Party is acting in concert with other employees to pursue their respective legal claims through individual arbitration proceedings. (ALJD p. 4, line 19 – p.5, line 6.)

9. Respondent excepts to the ALJ's conclusions of law as erroneous and unsupported in fact and law. (ALJD p. 19, lines 3-15.)

10. Respondent excepts to the ALJ's remedy and order in their entirety. (ALJD p. 19, line 18 – p. 21, line 27.)

11. Respondent excepts to the ALJ's conclusions, remedy, and order because they contravene the Federal Arbitration Act and cannot be enforced by this proceeding. (ALJD p. 19, line 3 – p. 21, line 27.)

12. Respondent excepts to the ALJ's interpretation, application, and extension of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). (ALJD p. 7, line 43 – p. 8, line 7.)

13. Respondent excepts to the ALJ's failure to rule on all material issues of fact, law, or discretion presented on the record as required by Rule 102.45. (*See* Respondent's Post-Hearing Brief.)

Dated October 4, 2016.

Respectfully submitted,

/s/Kevin Zwetsch
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CERTIFICATE OF SERVICE

The undersigned certifies that on October 4, 2016, a copy of the foregoing RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE has been filed via electronic filing with:

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